SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 30

THE NATIONAL CITY BANK OF NEW YORK,
PETITIONER,

vs.

THE REPUBLIC OF CHINA, THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, AS DIRECTOR OF THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE REPUBLIC OF CHINA, SHANGHAI-NANKING RAILWAY ADMINISTRATION, Moh Han, as Director of the Shanghai-Nanking Railway Administration, Sau Chen, as Deputy Director of the Shanghai-Nanking Railway Administration, Plaintiffs,

against

THE NATIONAL CITY BANK OF NEW YORK, Defendant

DOCKET ENTRIES

1951

May 2—Filed complaint and issued summons.

May 9—Filed summons and return, served G. Gless, Asst. Cashier 5/3/51.

May 22—Filed notice of appearance for The National City Bank of New York.

1952

Mar. 14—Filed stipulation and order as to service of answer, note of issue, and extension of time for motion and amended answer—Kaufman, J.

Mar. 14—Filed answer.

Mar. 19—Filed note of issue. Non-Jury Calendar Number 1753 assigned, 3/24/52.

[fol. 2]

July 11—Filed amended answer.

July 14—Filed stipulation extending time to move or reply, to 8/11/52.

Aug. 11—Filed stipulation extending time to move or reply, 9/15/52.

Sept. 15—Filed motion to dismiss counterclaims against The Republic of China.

Oct. 16—Filed stipulation adjourning return day on above motion to 10/30/52.

Nov. 3—Filed stipulation adjourning return day on above motion to 11/13/52.

1953

Jan. 9—Filed order and judgment dismissing counterclaims—Kaufman, J.

Jan. 22—Filed notice of motion for reargument and for leave to amend counterclaims, etc.

Feb. 4—Filed notice of appeal.

Feb. 14—Filed affidavit of Louis J. Gusmano in opposition to motion.

Feb. 27—Filed order dismissing motions—Kaufman, J.

Mar. 3—Filed stipulation extending time to serve and file designation of contents of record on appeal to 3/4/53 and designation of additional portions thereof to 3/16/53.

Mar. 4—Filed designation as to contents of record.

Mar. 6—Filed notice of appeal from order entered on 2/27/53.

Mar. 11—Filed designation as to contents of record.

[fol. 3] SUMMONS—May 2, 1951

Summons (omitted in printing)

[fol. 4] IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed May 2, 1951

Plaintiffs, complaining of defendant by their attorneys, Kirlin, Campbell & Keating, allege:

First: Plaintiff, The Republic of China, at all times mentioned herein was, and now is, a sovereign.

Second: The National Government of plaintiff, The Republic of China, now located at Taipeh, Taiwan (Formosa), was at all times mentioned herein, and is now, the proper and lawful government of The Republic of China, and maintains this suit for the said Republic and for plaintiff, Shanghai-Nanking Railway Administration.

Third: At all times mentioned herein the Department of State of the United States recognized, and now recognizes, the National Government of plaintiff, The Republic of China, as the proper and lawful government of The Republic of China.

Fourth: At all times mentioned herein, plaintiff, Shanghai-Nanking Railway Administration, was, and now is, an agency of the Ministry of Communications of the plaintiff, The Republic of China.

Fifth: At all times mentioned herein plaintiff, Moh Han, was and now is the Director of the Shanghai-Nanking Railway Administration, and a citizen of the plaintiff, The Republic of China.

Sixth: At all times mentioned herein, plaintiff, San Chen, was and now is the Deputy Director of the Shanghai-Nanking Railway Administration, and a citizen of the plaintiff, The Republic of China.

[fol. 5] Seventh: At all times mentioned herein, defendant was and now is a banking corporation organized and existing under the laws of the United States, having a New York branch at No. 55 Wall Street, Borough of Manhattan, in the City, County and State of New York.

Eighth: The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

Ninth: This action arises under Section 632 of Title 12, U. S. C., as hereinafter more fully appears.

Tenth: At all times mentioned herein there existed, and now exists, a Statute known as Section 25(b)4 of the Federal Reserve Act, 12 U. S. C. A. Section 632, which provides, in part:

> "Whenever (1) any insured bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary

of State to such insured bank, the payment, transfer, delivery, or other disposal of such property by such bank to or upon the order of such person shall be con-
[fol. 6] clusively presumed to be lawful and shall constitute a complete discharge and release of any liability of such bank for or with respect to such property."

Eleventh: In April 1949, and prior thereto, the plaintiffs had, and now have, on deposit with defendant, the sum of Two Hundred Thousand ($200,000.00) Dollars, lawful money of the United States of America, in the name of plaintiff, Shanghai-Nanking Railway Administration, which said sum defendant agreed to repay to plaintiff, Shanghai-Nanking Railway Administration, on demand.

Twelfth: In April 1949, plaintiff, The Republic of China, and plaintiff, Shanghai-Nanking Railway Administration, duly demanded from defendant the repayment of the balance held by defendant for the account of plaintiff, Shanghai-Nanking Railway Administration but the defendant refused, and still refuses, to repay said sums, or any part thereof.

Thirteenth: At all times mentioned herein the Department of State recognized, and now recognizes, that Dr. V. K. Wellington Koo is Ambassador Extraordinary and Plenipotentiary of the Republic of China to the Government of the United States, and that he is the accredited representative of the Republic of China to the Government of the United States, and that he is the only person authorized to speak in the United States for the Chinese Government.

Fourteenth: On or about June 22, 1950, Dr. V. K. Wellington Koo, the Chinese Ambassador to the United States, certified to the Secretary of State of the United States of America the names of plaintiff, Moh Han, and plaintiff, Sau Chen, as having authority to receive, control and dispose of the $200,000 held by defendant for the account of the plaintiff, Shanghai-Nanking Railway Administration.

[fol. 7] Fifteenth: On or about August 21, 1950, the authority of plaintiff, Moh Han, and plaintiff, Sau Chen, to act with respect to the $200,000 held by defendant for the account of the plaintiff, Shanghai-Nanking Railway Administration was accepted and recognized by the Secretary of State of the United States of America.

Sixteenth: On or about August 21, 1950, the Secretary of State of the United States of America certified to defendant the authority of plaintiff, Moh Han, and plaintiff, Sau Chen, to act with respect to the $200,000 held by defendant for the account of plaintiff, Shanghai-Nanking Railway Administration.

Seventeenth: A copy of the certificate referred to in Paragraph Sixteenth of this complaint, certified to be true, is hereto attached, as Exhibit 1.

Eighteenth: On or about October 17, 1950, after the receipt by defendant of said certification by the Secretary of State, plaintiffs demanded from defendant the repayment of the balance held by defendant for the account of plaintiff, Shanghai-Nanking Railway Administration, but the defendant again refused and still refuses to repay said sums, o- any part thereof.

Wherefore, plaintiffs demand judgment against defendant in the sum of Two Hundred Thousand ($200,000.00) Dollars, interest and costs; together with such other and further relief as is just.

Kirlin, Campbell & Keating, by Cletus Keating, a Member of the Firm (Attorneys for Plaintiffs, Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York 5, N. Y.

[fol. 8] EXHIBIT 1 TO COMPLAINT

This is a true copy of the signed original.

(Signed) Stanley D. Metzger, Dept. of State.

August 21, 1950.

Certification Pursuant to Section 25(b) of the Federal Reserve Act, as Amended

DEAR SIRS:

This certification relates to and includes all of the following described property:

(a) $200,000.00 which have been received by the National City Bank of New York from or for the ac-

count of the Shanghai-Nanking Railway Administration and deposited with and held by the National City Bank of New York in the name of the Shanghai-Nanking Railway Administration to the credit of the dollar account designated "The Shanghai-Nanking Railway Administration," being the balance in such account as of the close of business on April 14, 1950, together with any additional amounts which are thereafter so received and deposited with and held by the National City Bank of New York in the name of the above designated dollar account.

I hereby certify to the National City Bank of New York pursuant to the provisions of Section 25(b) of the Federal Reserve Act, as amended, as follows:

(1) That I have received a notification from the Assistant Secretary of the Treasury, dated July 20, 1950, complying with Section 25(b) of the Federal Reserve Act, as amended, of the issuance of the licenses therein described relating to the above described property;

(2) That China is a foreign state recognized by the Government of the United States;

[fol. 9] (3) That Dr. V. K. Wellington Koo is Ambassador Extraordinary and Plenipotentiary of the Republic of China to the Government of the United States and is recognized by me as being the accredited representative of the Republic of China to the Government of the United States;

(4) That said Dr. V. K. Wellington Koo has certified to me under date of June 22, 1950, in accordance with the provisions of Section 25(b) of the Federal Reserve Act, as amended, that the Shanghai-Nanking Railway Administration was on April 14, 1950, and has been at all times since that date, and is now, an agency of the Ministry of Communications of the Republic of China; that annexed to the said certificate of Dr. V. K. Wellington Koo dated June 22, 1950 and made a part thereof is a letter from the Director of the Shanghai-Nanking Railway Administration dated April 14, 1950 to the National City Bank of New York; a certifi-

cate dated April 14, 1950, issued by the Minister of Communications duly certified by the Secretary General of the Executive Yuan, the Minister of Foreign Affairs and Mr. Charles H. Fletcher, Vice Consul of the United States at Taipeh, Taiwan, China; the regulations governing the organization of the Shanghai-Nanking Railway Administration of the Ministry of Communications, promulgated on March 21, 1946; and a photostatic copy of the ministerial orders of appointment for the Director and Deputy Director of the Shanghai-Nanking Railway Administration; and that the persons designated in the signature list, referred to in and attached to the letter dated April 14, 1950 from the Director of the Shanghai-Nanking Railway Administration to the National City Bank of New York had on April 14, 1950 and have had at all times since [fol. 10] that date, and now have, full power and authority, subject to the conditions and limitations indicated in such signature list, to receive, control and dispose of any and all property described above.

(5) That I accept and recognize that the Shanghai-Nanking Railway Administration was on April 14, 1950, and has been at all times since that date, and is now, an agency of the Ministry of Communications of the Republic of China; and that the persons designated in the signature list, referred to in and attached to the letter dated April 14, 1950 from the Director of the Shanghai-Nanking Railway Administration to the National City Bank of New York, which signature list and letter dated April 14, 1950 are annexed to the said certificate of Dr. V. K. Wellington Koo dated June 22, 1950 and made a part thereof, had on April 14, 1950, and have had at all times since that date and now have full power and authority, subject to the conditions and limitations indicated in such signature list, to receive, control and dispose of any and all property described above.

Enclosed herewith and made a part hereof are authenticated copies of the above mentioned notification referred

to in item (1) above, and the certification referred to in item (4) above, with the enclosures thereto.

Very truly yours, (S.) Dean Acheson, Secretary of State.

Enclosures: As described above.

National City Bank of New York, 55 Wall Street, New York, New York.

[fol. 11] IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed July 11, 1952

The defendant answers the Complaint herein, as follows:

I. It has no knowledge nor information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs First, Second, Fifth, Sixth and Ninth thereof.

II. It has no knowledge nor information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs Third, Fourth, Thirteenth, Fourteenth, Fifteenth, Sixteenth and Seventeenth thereof, except that on August 23, 1950 it received by mail certain documents from the Department of State, copy of one of which designated "Certification Pursuant to Section 25(b) of the Federal Reserve Act, as amended" is attached to the Complaint herein as Exhibit 1.

III. It denies each and every allegation contained in Paragraph Seventh thereof, except that at all times mentioned in the Complaint it was and now is a banking corporation organized and existing under the laws of the United States with its principal place of business at No. 55 Wall Street, Borough of Manhattan, City, County and State of New York.

IV. It admits each and every allegation contained in Paragraphs Eighth and Tenth thereof.

V. It denies each and every allegation contained in Paragraph Eleventh thereof, except that in April 1949 and prior thereto it maintained on its books a deposit account [fol. 12] in the name of "Shanghai Nanking Railway Administration" which was in credit during that month in

the sum of two hundred thousand dollars ($200,000.00), lawful money of the United States of America, and except that the said account is now in credit in the sum of one hundred ninety-nine thousand, nine hundred ninety-two dollars and fifty cents ($199,992.50).

VI. It denies each and every allegation contained in Paragraph Twelfth thereof, except that it has made no payments to the plaintiffs or any of them from the account with it of the Shanghai Nanking Railway Administration.

VII. It denies each and every allegation contained in Paragraph Eighteenth thereof, except that on October 17, 1950 and after the receipt by it of the original of a document designated "Certification Pursuant to Section 25(b) of the Federal Reserve Act, as amended" and documents annexed thereto, it received for collection a check in the face amount of Two hundred thousand dollars ($200,000.00) purporting to be to the order of Mr. C. Y. Hsiao dated October 9, 1950 purporting to be signed by Shanghai Nanking Railway Administration by H. Moh, Managing Director and C. Sau, Adviser-Chief Secretary and that it refused payment thereof.

For a first complete defense to the alleged cause of action set forth in the complaint

The defendant alleges:

VIII. The defendant is a banking corporation organized and existing under the laws of the United States, having its head office and principal place of business at 55 Wall Street, New York City, and is, and at all times mentioned in the Complaint was, an insured bank within [fol. 13] the meaning of said phrase as defined in the Federal Reserve Act. At all times mentioned in the Complaint and up until August 14, 1950, the defendant maintained and operated a branch office in the City of Shanghai, China.

IX. On or about December 3, 1948, the defendant at its head office, 55 Wall Street, New York City, received a cable from its Shanghai branch advising it that the Nanking Shanghai Railway Administration requested the defendant to accept two hundred fifteen thousand dollars ($215,000.00) as an initial deposit for an account to be opened in the name

of the Nanking Shanghai Railway Administration at the defendant's head office in New York.

X. On information and belief, the plaintiff, "Shanghai Nanking Railway Administration," is sometimes referred to as the "Nanking Shanghai Railway Administration" and under various and sundry minor variations of said name and will be referred to hereinafter as the Shanghai Nanking Railway Administration, the name in which the defendant received the deposit hereinafter mentioned.

XI. On or about December 21, 1948, defendant received at its head office the sum of two hundred thousand dollars ($200,000.00) and no more, for the account of the said Shanghai Nanking Railway Administration and thereafter duly established an account on its books in said name in the credit of two hundred thousand dollars ($200,000.00).

XII. No further credits have been made to said account and no debits have been made thereto except for the sum of seven dollars and fifty cents ($7.50) charged against the said account by the defendant for certain banking services rendered and the account is now in credit in the amount of one hundred ninety-nine thousand nine hundred ninety-two [fol. 14] dollars and fifty cents ($199,992.50).

XIII. On information and belief, the opening or establishment of the said account was duly authorized by one Chen Po-chuang who was, at the time of the receipt of the two hundred thousand dollars ($200,000.00), as aforesaid, a director of the said Shanghai Nanking Railway Administration and as such had the authority to direct the opening of the account for and in behalf of the said Shanghai Nanking Railway Administration. Thereafter, the Shanghai branch of the defendant received a copy of a letter dated January 29, 1949, purporting to be signed by Yue Ta-wei who purported to sign under the title of "Minister" on behalf of the Ministry of Communications, addressed to one Wang Chao-huai, stating that the director of the said Shanghai Nanking Railway Administration, Chen Po-chuang, had been transferred and purporting to appoint the said Wang Chao-huai as acting director of the said Shanghai Nanking Railway Administration. Thereafter, the defendant was advised of various and sundry changes from time to time in the personnel of the officers

and directors of the said Shanghai Nanking Railway Administration, but at no time did the defendant receive at its head office any authentication from the Shanghai Nanking Railway Administration, or any other organization of similar name, of the powers of the said Chen Po-chuang, Wang Chao-huai, or any other person to sign, singly or jointly, with one or more others on the said account or otherwise to receive, control or dispose thereof in whole or in part and no checks, drafts or other directions or demands for withdrawal from or debits to the said account or any part thereof, have ever been made except as follows:

(a) The defendant received a letter from the Chinese Embassy, Washington, D. C., dated August 25, 1949, [fol. 15] signed by T. L. Tsui, Counselor of Embassy, incorporating the terms of a document stated to have been received from the Ministry of Communications of the Republic of China. A copy of the said letter is attached hereto as Exhibit "A" and for the exact terms thereof, reference is made thereto.

(b) Defendant received a letter dated February 14, 1950, purporting to be signed on behalf of the Shanghai Nanking Railway Administration (Nanking Shanghai Railway System Administration) by K. F. Mok and Y. T. Yu, requesting the defendant to close the account and transfer the balance to the account of the National Commercial Bank, Shanghai, for the account of Bank of China. A copy of the said letter is attached hereto as Exhibit "B" and for the exact terms thereof, reference is made thereto.

(c) A check in the face amount of $203,000, being the full amount of the credit balance in the said account, was presented for payment to the defendant on October 18, 1950 purporting to be drawn on the said account to the order of one C. Y. Hsiao dated October 9, 1950, and purporting to be signed on behalf of the Shanghai Nanking Railway Administration by H. Moh, as managing director thereof, and C. Sau, as adviser-chief secretary thereof, the check herein referred to being the said check mentioned in the Complaint herein.

(d) A check in the face amount of $206,000 was presented to the defendant for payment on August 24, 1951, subsequent to the commencement of this action, purporting to be drawn on the said account to the order of one C. Y. Hsiao, dated June 27, 1951, and purporting [fol. 16] to be signed on behalf of the Shanghai Nanking Railway Administration by H. Moh (Moh Han), director, and by C. Sau (Sau Chen), deputy director.

XIV. The defendant did not and has not complied with any of the said demands either in whole or in part and the said account has not been debited at the request of any person whatsoever and no debit has been made to the account except for banking charges as specifically set forth in paragraph XII hereof.

XV. On information and belief, neither of the signers of the two checks above referred to in sub-paragraphs designated (c) and (d) of paragraph XIII hereof, nor the signers of the letters referred to in sub-paragraphs (a) and (b) of paragraph XIII hereof, have at any time had any authority whatsoever to receive, control or dispose of the said account or any part thereof.

For a second complete defense to the alleged cause of action set forth in the complaint

The defendant repeats and realleges each and every allegation contained in the foregoing first defense, and further alleges:

XVI. On or about April 7, 1941, an amendment to the Federal Reserve Act, known as Section 25(b) thereof, duly became law having been duly passed by the Congress of the United States and duly signed by the President. A copy of the relevant portions of the said amendment to the Federal Reserve Act is annexed hereto marked Exhibit "C" and made a part hereof and for the exact terms thereof, reference is made thereto.

[fol. 17] XVII. The said law at all times mentioned in the Complaint, provided and still provides, subject to the terms and conditions therein expressed, that whenever an insured bank has received any property from or for the account of a foreign state which is recognized by the Govern-

[fol. 34] IN UNITED STATES DISTRICT COURT

PLAINTIFFS' NOTICE OF MOTION TO DISMISS COUNTERCLAIMS—
Filed September 15, 1952

SIRS:

Please take notice that the plaintiff The Republic of China will move this Court at a special term for the hearing of motions, at Room 506, United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York on the 7th day of October, 1952, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, to dismiss, pursuant to Rule 12 F. R. C. P., the counterclaims pleaded by the defendant against plaintiff The Republic of China on the following grounds:

1. That the Court lacks jurisdiction thereof because plaintiff The Republic of China is a friendly sovereign which has not consented to be sued on the matters therein alleged.

2. That they fail to state claims against plaintiff The Republic of China upon which relief can be granted.

and for such other, further and different relief as to the Court may seem just and proper.

Dated, New York, N. Y., September 15, 1952.

Yours, etc., Kirlin, Campbell & Keating, By Louis J. Gusmano, A Member of the Firm, Attorneys for Plaintiffs, Office & P. O. Address, 120 Broadway, New York 5, N. Y.

[fol. 35] To: Shearman & Sterling & Wright, Esqs., Attorneys for Defendant, 20 Exchange Place, New York, N. Y.

ment of the United States, or from or for the account of a central bank of such foreign state and holds such property in the name of such foreign state or central bank, the Secretary of State may certify to such insured bank the authority of a person duly designated by such foreign state to the Secretary of State to receive, control and dispose of such property. Said law further provides that if the Secretary of State certifies to an insured bank the authority of a person certified to him by the said foreign state, the payment, transfer, delivery or other disposal of such property by such bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of such bank for or with respect to such property.

XVIII. On or about August 23, 1950, defendant received by mail from the Secretary of State certain documents purporting to be a certificate granted pursuant to the terms and conditions of Section 25(b) of the Federal Reserve Act, as amended, at the request of the plaintiff, the Republic of China, said certification being the same certification referred to in the Complaint herein which purported to grant to one Moh Han, as the alleged director of the Shanghai Nanking Railway Administration, and one Sau Chen, as the alleged deputy director of the Shanghai Nanking Railway Administration, the authority to receive, control and dispose of the bank account received by the defendant and held in the name of the Shanghai Nanking Railway Administration.

[fol. 18] XIX. On information and belief, the certificate received from the Secretary of State by the defendant herein, being the document referred to in the Complaint, was not executed by the Secretary of State in accordance with the purpose and intent of the said Section 25(b) of the Federal Reserve Act; was not given or granted in accordance with the foreign policy of the United States; and that the purported effort by the Secretary of State in granting to the plaintiffs, Moh Han and Sau Chen, authority to receive, control and dispose of property received by the defendant from the Shanghai Nanking Railway Administration and held by it in the name of the said Administration, is null and void for all purposes whatsoever.

IN UNITED STATES DISTRICT COURT

APPEARANCES:

Kirlin, Campbell & Keating, Attorneys for Plaintiff, The Republic of China, Cletus Keating, Robert E. Kline, Jr., Louis J. Gusmano, of Counsel.

Shearman & Sterling & Wright, Attorneys for Defendant, Chauncey B. Garver, W. Harvey Reeves, of Counsel.

OPINION, KAUFMAN, J., GRANTING PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS—December 22, 1952

IRVING R. KAUFMAN, D. J.:

Plaintiffs, The Republic of China, and others, have commenced an action against the defendant, under Section 632 of Title 12, U. S. C. to recover the sum of $200,000 said to be on deposit with defendant and which the defendant refuses to pay. This sum was deposited in the name of plain- [fol. 36] tiff, Shanghai-Nanking Railway Administration, said to be an agency of the Ministry of Communications of the plaintiff, The Republic of China. The Secretary of State, pursuant to Section 25(b) of the Federal Reserve Act has certified to defendant that the deposit in question belongs to the plaintiff. Defendant has denied the essential allegations of the complaint, pleaded affirmative defenses, and has asserted two counterclaims against plaintiff, The Republic of China. The first counterclaim alleges that on or about August 9, 1920, defendant participated in a loan made by J. P. Morgan & Co. to the Pacific Development Co. in the face amount of $5,000,000, said loan being secured by a $5,500,000 Chinese Government Treasury Note, being the Note of the plaintiff herein, The Reublic of China. Said loan was not paid on its maturity date by Pacific Development Company and subsequently Pacific Development Company was liquidated. In the course of said liquidation, J. P. Morgan & Co. offered the collateral for sale at public auction and purchased the collateral on behalf of the participants in the loan to the Pacific Development Company. The Chinese Government Treasury Note is still held by J. P. Morgan & Co. and is now past due, and by virtue

For a third compete defense to the Alleged Cause of Action set forth in the Complaint.

The defendant repeats and realleges each and every allegation contained in the foregoing first and second defenses, and further alleges:

XX. On information and belief, the plaintiff, Shanghai Nanking Railway Administration, is neither a "foreign state" nor a "central bank" in accordance with the definition thereof in Article 25(b), Paragraph 3 of the Federal Reserve Act and, therefore, any certificate by the Secretary of State of the United States of America purporting to grant authority to any person to receive, control or dispose of said account or otherwise exercise any control or dominion over such account is null and void.

[fol. 19] For a fourth complete defense to the alleged cause of action set forth in the complaint

The defendant repeats and realleges each and every allegation contained in the foregoing first, second and third defenses, and further alleges:

XXI. The defendant received the property from the Shanghai Nanking Railway Administration and at all times mentioned in the complaint held and still holds the same in the account of Shanghai Nanking Railway Administration; and, on information and belief, it did not receive such property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and at no time has it held, and it does not now hold, such property in the name of such foreign state or such central bank; and, therefore, any certificate by the Secretary of State of the United States of America purporting to grant authority to any person to receive, control or dispose of said account or otherwise exercise any control or dominion over such account is null and void.

For a fifth complete defense to the alleged cause of action set forth in the complaint

thereof there is said to be owing to the defendant the sum of $317,720.93 plus interest of $590,386.53.

For a second counterclaim against plaintiff, The Republic of China, the defendant alleges that between April and August 1947 defendant began the purchase of Chinese Government 36th Year Short Term Treasury Notes of The Republic of China. On these notes, the plaintiff, The Republic of China, is said to be indebted to the defendant in the sum of $391,033.60 principal together with interest thereon in the sum of $335,290.94. Defendant demands judgment against the plaintiffs dismissing the complaint with costs, and against the plaintiff, The Republic of China, for the sum of $1,634,432.

[fol. 37] Plaintiff, The Republic of China, has moved pursuant to Rule 12 of the Federal Rules of Civil Procedure, to dismiss the counterclaims on the following grounds:

> (1) That the Court lacks jurisdiction thereof because plaintiff, The Republic of China, is a friendly sovereign which has not consented to be sued on the matters therein alleged.
>
> (2) That they fail to state claims against plaintiff, The Republic of China, upon which relief can be granted.

In opposition to this motion, the defendant has advanced the contention that the motion is premature because there is no proof before this Court that the property is that of a sovereign. The defendant has alleged that the Shanghai-Nanking Railway Administration is not a mere agency of the government but has independent existence and that the plaintiff, The Republic of China, is not in a position to sue and recover on this bank account. This allegation is contained in the affirmative defenses which defendant has asserted. In support of the contention that whether the organization in whose name the property is held is a sovereign or at least an agency of a foreign sovereign exercising governmental functions is a matter which must be proved by the plaintiff, defendant relies on such cases as *Chase National Bank* v. *Directorate General of Postal Remittances & Savings Bank*, 278 App. Div. 820, 824, 105 N. Y. S. 2d 416 (1st Dept. 1951), on reargument 278 App. Div.

The defendant repeats and realleges each and every allegation contained in the foregoing first and second defenses, and further alleges:

XXII. On information and belief, in the exercise of foreign policy, the State Department of the United States Government has determined that the hostilities, as a result of which the plaintiff, Republic of China, was driven from the mainland of China, was a civil war, waged on the main- [fol. 20] land of China by Chinese nationals, revolutionaries to the said plaintiff. It is the policy of the United States not to intervene in the internal political affairs of foreign nations, including the determination and outcome of civil wars which may be fought therein, nor to determine, as between the recognized government of such a country and the rebels or revolutionaries to that government who at any time may have set up governmental control over the whole or part of the territory of said government, which thereof has the right, title and interest in or to property within the United States received from or for the account of a foreign state which is recognized by the government of the United States or from or for the account of a central bank of such foreign state and held by such insured bank in the name of such foreign state or such central bank. Any act determining or purporting to determine which of two rival contending governments of such a country, or representatives thereof, has such right, title and interest in or to such property or the right or authority to receive, control and dispose thereof, is an intervention in the internal political affairs of such country and is contrary to the policy of the United States and beyond the authority and competence of the Secretary of State.

For a sixth complete defense to the alleged cause of action set forth in the complaint

The defendant repeats and realleges each and every allegation contained in the foregoing first, second, third and fourth defenses, and further alleges:

XXIII. On information and belief, Section 25(b) of the Federal Reserve Act, in so far as it gives or purports to give judicial authority to the Secretary of State to determine as between two rival claimants the right, title and

935, 105 N. Y. S. 2d 923, 924; leave to appeal denied, 279 App. Div. 576, 107 N. Y. S. 2d 542; appeal dismissed, 303 N. Y. 800 (1952); *Hannes* v. *Kingdom of Roumania Monopolies Institute*, 260 App. Div. 189, 20 N. Y. S. 2d 825 (1st Dept. 1940); *Telkes* v. *Hungarian National Museum*, 265 App. Div. 192, 38 N. Y. S. 2d 419 (1st Dept. 1942).

[fol. 38] While this point might be well taken if it were directed to a motion to strike the affirmative defenses it is wholly inappropriate here for the simple reason that the counterclaims in question are pleaded, not against the Shanghai-Nanking Railway Administration but against The Republic of China itself.

There is no contention that The Republic of China is not a friendly foreign sovereign. In fact in paragraph XXXIV of the counterclaim, defendant admits that:

> "The plaintiff, The Republic of China, is, and at all times hereinafter mentioned was, a sovereign government recognized as such by the duly appointed Executive Department of the Government of the United States."

As a second ground for opposing the motion defendant asserts that the plaintiff cannot show right of sovereign immunity as claimed because plaintiff voluntarily came to this Court and is using its facilities to collect a debt. But it is well settled that counterclaims may not be asserted against a friendly foreign sovereign unless they are based on the subject matter of the suit. *United States* v. *New York Trust Co.*, 75 F. Supp. 583 (D. C. S. D. N. Y. 1946). *Republic of China* v. *American Express Co.*, C. A. 2, 1952, 195 F. 2d 230, 233. When the counterclaim is based on the same subject matter the court may say that the sovereign "has waived immunity" or "consented to suit". These are legal fictions based on the notion that it would be exceedingly inequitable to allow any plaintiff to function as a normal litigant when it is to its advantage to do so, but to raise the shield of sovereign immunity with respect to the same matter, when the tides are turned against it. But, the bringing of an action against a defendant cannot be said to be consent by plaintiff to suit for any unre-[fol. 39] lated claims which defendant may have against

interest in or to property within the United States is un- [fol. 21] constitutional as an attempt to grant to a branch of the executive department powers which are the sole prerogative of the judicial department.

For a seventh complete defense to the alleged cause of action set forth in the complaint

The defendant repeats and reallages each and every allegation contained in the foregoing first, second, third and fourth defenses, and further alleges:

XXIV. On information and belief, the plaintiff, Shanghai Nanking Railway Administration, is a corporation organized and existing under the laws of China and formerly carried on the business of managing, controlling, financing or otherwise operating or assisting in the operation and control of a railroad within the mainland of China.

XXV. On information and belief, the law of the Republic of China, known as the "Company Law of China," hereinafter referred to as the "Company Law," was duly promulgated by the Republic of China on April 12, 1946, on which date it became effective as to said plaintiff.

XXVI. On information and belief, the Company Law of China since April 12, 1946, provided and still provides in Ch. I, Article 8 thereof, that "the term head office as used in this law denotes the principal office first established according to law to take charge of the affairs of the entire organization."

XXVII. On information and belief, the Company Law of China at all times since April 12, 1946, provided and still provides in Ch. II, Article 13 thereof, that "the domicile of the company is the location of its head office."

[fol. 22] XXVIII. On information and belief, the domicile of the plaintiff, Shanghai Nanking Railway Administration, is and at all times has been, in the City of Shanghai, China, which was originally designated as the head office thereof and no other designation or change of seat has been made in accordance with law and the said head office continues as a matter of law to be the domicile thereof.

XXIX. On information and belief, the plaintiffs, Moh Han and San Chen, are not now and were not at the time of the purported demand upon the defendant for with-

that government. Compare the opinion in *State of Russia* v. *Bankers Trust Company*, 4 F. Supp. 417, 420 (D. C. S. D. N. Y. 1933) with that of the Court of Appeals in affirming *sub nom United States* v. *National City Bank of New York*, 83 F. 2d 236, cert. denied. 299 U. S. 563 (1936). It is not alleged, nor is it urged, as indeed it could not be, that the counterclaims here arise out of the same subject matter covered in the complaint. Rather, defendant relies on such cases as *United States* v. *National City Bank of New York*, *supra*, and *United States v. National City Bank of New York*, 90 F. Supp. 448, (D. C. S. D. N. Y. 1950), to support the proposition that the right to counterclaim against a sovereign depends upon "the equities" of that claim. In these cases plaintiffs sued to recover money on deposit with the defendant bank and were met with counterclaims for amounts due on Russian Treasury notes. The Court of Appeals held that the notes, payable at the defendant bank were equivalent to an order to pay the same from the account of the debtor under the New York Negotiable Instruments Law and allowed the counterclaims while affirming the principle that only claims arising out of the same transaction may be set-off against a sovereign. But closer to the facts of the instant case, where there is absent any allegation that the notes in question are payable at the bank holding the deposit, is the case of *United States* v. *New York Trust Company*, 75 F. Supp. 583 (D. C. S. D. N. Y. 1946) where the Court disallowed the counterclaim stating that the notes were unrelated to the deposit transaction and therefore were not available against the sovereign without its consent.

Other contentions of the defendant require but brief discussion. One, that the plea of sovereign immunity is not properly before this Court presents much the same issues [fol. 40] as the defendant's argument based on the alleged independent corporate nature of the Shanghai-Nanking Railway. With respect to the counterclaim we do not have a case where a sovereign is asserting that property in another's possession is actually state property, as was the case in *Kunglig Jarnvagsstyrelsen (Swedish State Railways)* v. *Dexter & Carpenter* (C. A. 2, 1929) 32 F. 2d 195, cert. denied 280 U. S. 579 (1929) and *Anderson* v. *N. V.*

drawals or transfers of the account of the Shanghai Nanking Railway Administration, at the head office thereof or authorized by the head office to make such withdrawals or otherwise to act for or on behalf of the plaintiff, Shanghai Nanking Railway Administration, and all acts or purported acts done by them on behalf of the plaintiff, Shanghai Nanking Railway Administration are null and void.

For an eighth complete defense to the alleged cause of action set forth in the complaint

The defendant repeats and realleges each and every allegation contained in the foregoing first, second, third and fourth defenses; and further alleges:

XXX. On information and belief, the plaintiff Shanghai Nanking Railway Administration, is a corporation organized and existing under the laws of China for the purpose of receiving and disbursing funds and otherwise having supervision of the operation and control of a railroad operating on the mainland of China, sometimes referred to as the Shanghai Nanking Railway.

XXXI. On information and belief, the Company Law [fol. 23] of China on April 12, 1946 provides, and still provides in Ch. II, Article 22 thereof, that "a company shall not engage in any business outside of the scope of the purposes for which it has been registered."

XXXII. On information and belief, the plaintiffs, Moh Han and Sau Chen, purporting to act for the said plaintiff, Shanghai Nanking Railway Administration, are not now, nor have they, at any time on or since the demand made upon this defendant, been engaged in any activity relating to the financing, operation, maintenance or otherwise, of the Shanghai Nanking Railway and no funds received by the said persons purportedly for or on behalf of the Shanghai Nanking Railway Administration are or will be used for the said purpose and any disposition of funds contrary to the purpose for which the said organization was created is illegal pursuant to the Company Law of China as aforesaid.

For a first counterclaim against plaintiff, the republic of China

Transandine, 289 N. Y. 9, 43 N. E. 2d, 502 (1942). Here, as was said previously, the counterclaim is brought against plaintiff, The Republic of China, and the sovereignty of this plaintiff is unquestioned, and indeed alleged by the defendant (paragraph XXXIV of answer). An additional argument that the defendant has a right to make its debit by reason of a banker's lien has no validity in this context.

The motion to dismiss the counterclaim is hereby granted. Settle order.

Dated: New York, N. Y., December 22, 1952.

Irving R. Kaufman, U. S. D. J.

[File endorsement omitted.]

[fol. 41] IN UNITED STATES DISTRICT COURT

ORDER AND JUDGMENT GRANTING PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS—January 9, 1953

Plaintiff, The Republic of China, having moved to dismiss the counterclaims pleaded by the defendant against the said plaintiff, The Republic of China, on the ground that the Court lacks jurisdiction thereof because plaintiff, The Republic of China, is a friendly sovereign which has not consented to be sued on the matters therein alleged, and on the further ground that they fail to state claims against plaintiff, The Republic of China, upon which relief can be granted, and after hearing counsel for the respective parties and on filing the opinion of the Court, and it appearing that the said counterclaims are the only counterclaims contained in the answer of the defendant herein, it is

Ordered that the said motion be and is hereby granted, and it is further

Ordered that in accordance with rule 54(b) of the Federal Rules of Civil Procedure, it is hereby determined that there is no just reason for delay and the entry of judgment is accordingly directed, and it is

The defendant alleges:

XXXIII. The defendant is, and at all times hereinafter mentioned was, a banking corporation organized and existing under the laws of the United States of America, having its principal place of business at No. 55 Wall Street, New York City, and maintaining and operating a branch, among others, at Shanghai, China, until August 14, 1950.

XXXIV. The plaintiff, The Republic of China, is, and at all times hereinafter mentioned was, a sovereign government recognized as such by the duly appointed Executive Department of the Government of the United States. [fol. 24] XXXV. On or about August 9, 1920, the defendant participated in a loan made by J. P. Morgan & Co. to the Pacific Development Company in the face amount of five million dollars ($5,000,000), said loan being secured by a five million, five hundred thousand dollar ($5,500,000) Chinese Government Treasury Note, being the Note of the plaintiff herein, The Republic of China. Said loan was not paid on its maturity date by Pacific Development Company in accordance with its terms and subsequently Pacific Development Company was liquidated. In the course of the liquidation and in furtherance thereof, on April 4, 1928, J. P. Morgan & Co. offered the collateral for sale at public auction and purchased the said collateral on behalf of the participants in the said loan to the Pacific Development Company. The said Chinese Government Treasury Note is still held by J. P. Morgan & Co. and is now past due in accordance with its terms, and the defendant herein has a participating interest therein in the amount of Three hundred seventeen thousand, seven hundred twenty dollars and ninety-three cents ($317,720.93) principal amount. At all times subsequent to the purchase by J. P. Morgan & Co., as aforesaid, the interest of the defendant in the said Note was known to the plaintiff herein, The Republic of China, which recognized its indebtedness thereon to the defendant. No part of the defendant's participation in the principal of said Note has been paid, although payment thereof has been duly demanded. There is now due from the plaintiff, The Republic of China, to the defendant on account of the principal, as aforesaid, the sum of three hundred seventeen thousand,

Ordered and adjudged that all the counterclaims contained in the answer herein be and are hereby dismissed.

Dated: New York, New York, January 8, 1953.

(S.) Irving R. Kaufman, U. S. D. J.

Judgment entered this 9 day of January, 1953.

(S.) William V. Connell, Clerk.

[fol. 42] In United States District Court

[Title omitted]

Notice of Appeal—Filed February 4, 1953

Sirs:

Notice is hereby given that The National City Bank of New York, defendant herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the final order and judgment dated January 8, 1953 and entered in this action on January 9, 1953 in the office of the Clerk of this Court, by which it was ordered that the motion by the plaintiff, The Republic of China, to dismiss the counterclaims contained in defendant's amended answer be granted and determining that, because there was no just reason for delay, the entry of judgment be directed, and by which it was ordered and adjudged that all the counter-[fol. 43] claims contained in the defendant's answer herein be dismissed, and that the defendant appeals from each and every part of said order and judgment as well as from the whole thereof.

Dated, New York, N. Y., February 3, 1953.

Yours, etc., Shearman & Sterling & Wright, By Chauncey B. Garver, a Member of the Firm, Attorneys for defendant, The National City Bank of New York, 20 Exchange Place, New York, New York.

To: Messrs. Kirlin, Campbell & Keating, Attorneys for plaintiff, The Republic of China, 120 Broadway, New York 5, New York.

[fols. 44-45] Designation as to Contents of Record—Filed March 4, 1953 (omitted in printing)

seven hundred twenty dollars and ninety-three cents ($317,720.93) plus interest as of the date hereof amounting to five hundred ninety thousand, three hundred eighty six and 53/100 dollars ($590,386.53).

[fol. 25] For a second counterclaim against plaintiff, the Republic of China.

The defendant repeats and realleges every allegation contained in paragraphs XXXIII and XXXIV of the foregoing first counterclaim, and further alleges:

XXXVI. Between the dates of April and August, 1947, defendant, by its Shanghai branch, began the purchase of Chinese Government 36th Year Short Term Treasury Notes of the Republic of China, pursuant to the terms of which the plaintiff, The Republic of China, agreed to pay the face amount of each of said Notes within three years, redemptions every six months, as more particularly set forth in the said Notes, a copy of one of which is annexed hereto as Exhibit "D" which is made a part hereof and for the exact terms of said Note reference is made thereto.

XXXVII. Each of said Notes bore the same terms and conditions and differed only in the face amount and the maturity dates thereof. Said Notes were by their terms to be paid in national currency at the United States dollar exchange rate of the Central Bank of China prevailing on the day of payments.

XXXVIII. The defendant made such purchases from time to time in accordance with the following schedule:

Date of Purchase	U. S. Dollars Amount	Conversion Rate	Chinese National Currency
April to August, 1947	$300,000.00	12,000	$ 3,600,000,000
October 2, 1947	$ 50,000.00	50,100	$ 2,505,000,000
October 25, 1947	$ 50,000.00	55,700	$ 2,785,000,000
March 23, 1948	$ 92,000.00	258,500	$23,782,000,000
March 23, 1948	$ 8,333.00	244,649	$ 2,038,660,117
March 24, 1948	$ 10,832.90	233,523	$ 2,529,731,300
March 25, 1948	$ 19,624.70	233,513	$ 4,582,692,625

[fol. 26] XXXIX. No payments on account of the principal or interest of the said Notes have been made by or on behalf of the plaintiff, The Republic of China, except the

[fol. 46] IN UNITED STATES DISTRICT COURT

DEFENDANT'S NOTICE OF MOTION FOR REARGUMENT AND FOR LEAVE TO AMEND COUNTERCLAIMS, ETC.—Filed January 22, 1953

SIRS:

Upon the summons and complaint and the amended answer herein and the affidavits of W. Harvey Reeves and George F. Nolte, both duly verified January 22, 1953, and upon the order of this Court and a judgment thereof dated January 8, 1953 duly filed on January 9, 1953 as the Court's determination of a motion heretofore made by plaintiff, The Republic of China, on September 15, 1952, by which the Court granted said motion and dismissed the counterclaims, and upon the opinion of the Court herein dated December 22, 1952, copies of all of which are attached hereto as exhibits, the defendant, The National City Bank of New York, hereby makes a motion in this Court pursuant to Rule 9 of the Rules of the United States District Courts for the Southern and Eastern Districts of New York for an order:

1. Granting leave to the defendant, said The National City Bank of New York, for re-argument of the said motion by the plaintiff for dismissal of the counterclaims of the defendant on the grounds that:

a. The Court in dismissing the said counterclaims has overlooked controlling decisions of this and other courts and the Supreme Court of the United States;

b. The Court in dismissing the said counterclaims without adequate provision for the amending thereof, particularly to permit the defendant to show that as to one counterclaim the obligation was payable at [fol. 47] the defendant Bank and in the other that the defendant Bank was one member of a syndicate of various banks and that the obligation was payable at one of the said banks for the protection and convenience of all, including the defendant, has seriously and unduly prejudiced the defendant.

c. The Court has failed to take into consideration

partial payments as to principal and as to interest as shown in the following schedule:

Date of Partial Payment of Principal or Interest as Indicated	U. S. Dollars Amount	Conversion Rate	Chinese National Currency
October 1, 1947	$49,998.00 (principal)	48,000	$ 2,444,902,200
October 1, 1947	$28,500.00 (interest)	48,900	$ 1,393,650,000
March 31, 1948	$57,760.20 (principal)	251,500	$14,526,690,300
March 31, 1948	$31,998.80 (principal)	251,500	$ 8,047,698,200
April 1, 1948	$45,675.00 (interest) (approximate)	251,500	$11,487,262,500 (approximate)

XL. As of the date hereof the plaintiff, The Republic of China, is indebted to the defendant on account of the principal of the said Notes in an amount of local currency equal to the sum of three hundred ninety one thousand, thirty three dollars and sixty cents ($391,033.60) in United States dollars, together with interest thereon in an amount of local currency equal to the sum of three hundred thirty five thousand, two hundred ninety and 94/100 dollars ($35,290.94) in United States dollars.

Wherefore, defendant demands judgment against the the plaintiffs dismissing the complaint herein with costs, and against the plaintiff, The Republic of China, for the sum of one million, six hundred thirty four thousand, four [fol. 27] hundred thirty two and no/100 dollars ($1,634,-432.00) with interest and costs.

Dated: New York, N. Y., July 11, 1952.

Shearman & Sterling & Wright, By Chauncey B. Garver, A Member of the Firm, Attorneys for the defendant, The National City Bank of New York, 20 Exchange Place, Borough of Manhattan, City of New York.

To: Messrs. Kirlin, Campbell & Keating, Attorneys for plaintiffs, 120 Broadway, New York 5, New York.

(i) the policy of the State Department that sovereign immunity should not be granted except where the said State Department has found that the granting thereof was in the interests of the United States and has so informed the Court and (ii) the absence in this case of any such information from the State Department.

2. Vacating the said order and judgment entered herein on January 9, 1953 or in the alternative directing the resettlement of the said order and judgment to permit the defendant to amend the said counterclaims and each of them.

The defendant at the same time and place hereby makes a motion in this Court for an order:

3. Granting leave to the defendant to submit within ten days after the final determination hereof a further amended answer in which shall be included amendments to the said counterclaims and particularly as to the claim designated first counterclaim, also to designate the same as "set off" and to allege therein in addition to present allegations the manner and place of the payment of the obligation therein set forth and as to the claim designated second counterclaim also to designate the same as "set off" and to allege therein in addition to present allegations, particularly that the paying agents of said obligations for the plaintiff, The Republic of China, were the Central [fol. 48] Bank of China and its appointed banks; that the Shanghai branch of The National City Bank of New York, defendant herein, was an appointed bank and one of the places at which the said obligations were payable and for such other amendments as may seem pertinent, and

4. For such other and further relief as may be just.

Take notice that we will bring the above motion on for hearing before this Court at Room 506, United States Court House, Foley Square, City, County and State of New York, on January 29, 1953 at 10:00 o'clock in the forenoon of that day pursuant to Rule 9 of the rules of this Court above stated, and

Take further notice that pursuant to Rule 6 of the United States Rules of Civil Procedure you are required to serve

EXHIBIT A TO AMENDED ANSWER

Chinese Embassy, Washington 8, D. C.

August 25, 1949.

Mr. C. C. Ransom, The National City Bank of New York, 55 Wall Street, New York, New York.

DEAR MR. RANSOM:

Confirming our telephone conversation, I beg to inform you that this Embassy has received a document from the [fol. 28] Ministry of Communications of the Republic of China, informing us to the following effect:

> The Ministry of Communications has an account in the name of the Shanghai-Nanking Railway Administration with the New York Office of the National City Bank of New York. A sum of $200,000.00 (US currency) was deposited to the said account. Mr. Wang Chao-Huai, Acting Administrator, and Mr. Wang Yun-Hsun, Chief Secretary, or Mr. Chen Peh-Chuang, Advisor, were authorized to make withdrawals. In April, 1949, Mr. Chen Fu-hai was appointed to replace Mr. Wang Chao-Huai as Administrator and Mr. Chen had duly informed the National City Bank of New York to cancel the authority of Mr. Wang, and Mr. Wang or Mr. Chen, to make withdrawals against the account.
>
> When the situation in Shanghai was precarious, there was no need for the fund. A letter was then addressed to the Shanghai Office to the National City Bank of New York to cancel the authority of Mr. Chen Fu-hai to make withdrawals, to close the account, and to remit the balance of the account to the Ministry of Communications.
>
> The Ministry of Communications now requests that money be either paid to Dr. Hsiao Ching-yun, Director of the Office in the United States of the Ministry of Communications, or remit the money directly to the Ministry of Communications through the Hongkong Office of the National City Bank of New York.

answering affidavits not later than one day before the hearing thereof.

Dated: New York, N. Y., January 22, 1953.

Yours, etc. Shearman & Sterling & Wright, By Sgd. C. B. Garver, Member of the Firm, Attorneys for the defendant, The National City Bank of New York, sued herein as National City Bank of New York, 20 Exchange Place, Borough of Manhattan, City of New York.

[fol. 49] To: Messrs. Kirlin, Campbell & Keating, Attorneys for the Plaintiffs, 120 Broadway, New York 5, N. Y.

Affidavit of W. Harvey Reeves, Read in Support of Defendant's Motion

State of New York,

County of New York—ss:

W. Harvey Reeves, being duly sworn, says:

1. I am an attorney associated with the firm of Shearman & Sterling & Wright, attorneys for the defendant, The National City Bank of New York (hereinafter referred to as "City Bank"), and am fully familiar with all the proceedings heretofore had herein and with the facts hereinafter set forth.

2. The Republic of China made a motion in this Court to dismiss the counterclaims pleaded by the defendant against the plaintiff, The Republic of China, on the grounds:

(1) That the Court lacks jurisdiction thereof because plaintiff The Republic of China is a friendly sovereign which has not consented to be sued on the matters therein alleged.

[fol. 50] (2) That they fail to state claims against plaintiff The Republic of China upon which relief can be granted.

By order and judgment of this Court entered on the 9th day of January, 1953, this motion was granted in its entirety. The opinion of the Court herein was handed down on December 22, 1952.

[fol. 29] We shall appreciate it if you would comply with the request of the Ministry of Communications at your early convenience.

Yours sincerely, T. L. Tsui, Counselor of Embassy.

EXHIBIT B TO AMENDED ANSWER

Nanking-Shanghai Railway System Administration
Chinese National Railways

Shanghai, 14th February, 1950.

The National City Bank of New York, Overseas Division,
55 Wall Street, New York 15, N. Y.

DEAR SIRS:

Please accept this letter as your authority to close our account with you and transfer the outstanding balance to the account of the National Commercial Bank, Shanghai, for account of the Bank of China. Please confirm by cable to the National Commercial Bank, Shanghai, the amount transferred.

Yours very truly, K. F. Mok, Y. T. Yu.

[fol. 30] EXHIBIT C TO AMENDED ANSWER

Relevant portions of Section 25(b) of the Federal Reserve Act (Title 12, U. S. C. Section 632) in part.

"Whenever (1) any insured bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of

3. The Republic of China, the moving party, is one of several plaintiffs, the others being Shanghai-Nanking Railway Administration and two individuals claiming to be a Director and Deputy Director of the Shanghai-Nanking Railway Administration.

4. The plaintiff seeks to recover of the defendant a banking account with it standing in the name of "Shanghai-Nanking Railway Administration" and alleges in Paragraph Fourth of the complaint that "at all times mentioned the plaintiff Shanghai-Nanking Railway Administration was and now is an agency of the Ministry of Communications of the plaintiff, The Republic of China." On this allegation and the presentation of a certificate of the State Department granted under Section 25(b) of the Federal Reserve Act as amended, on its ex parte representations to said State Department, it appears to base its claim of right to recover the said bank account.

The defendant admits the existence of the bank account. It denies it has any knowledge in regard to the claims by plaintiff; that the Shanghai-Nanking Railway Administration is an agency of the Ministry of Communications of The Republic of China, or if such fact would entitle the plaintiff to recover. Defendant has various affirmative defenses and also alleges two counterclaims. For the pleadings and the exact term of the counterclaims reference is made to the documents themselves, copies of which [fol. 51] are attached to the moving papers marked Exhibits A and B.

5. I verily believe that in deciding this motion reliance has been made on one or more cases which are not applicable to the facts as pleaded.

6. I further verily believe that inferences were drawn as to the non-existence of certain facts, and these inferences or facts were considered pertinent and in fact controlling but that the actual facts of the case negative the said inferences and that reconsideration on the law and the facts should be given because if the facts which exist but were not pleaded are still considered pertinent amendments should be permitted to the said counterclaims in order that all of the facts may properly be before this Court.

7. In accordance with the provisions of Rule 9 I have

such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to such insured bank, the payment, transfer, delivery, or other disposal of such property by such bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of such bank for or with respect to such property. Any suit or other legal proceeding against any insured bank or any officer, director, or employee thereof, arising out of the receipt, possession, or disposition of any such property shall be deemed to arise under the laws of the United States and the district courts of the United States shall have exclusive jurisdiction thereof, regardless of the amount involved; and any such bank or any officer, director, or employee thereof which is a defendant in any such suit may, at any time before trial thereof, remove such suit from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law.

[fol. 31] "Nothing in this section shall be deemed to repeal or to modify in any manner any of the provisions of sections 95a, 213, 411-415, 417, or 467 of this title, sections 311a, 315b, 316a, 316b, 405a, 408a, 408b, 440-446, 448-448e, 733-734b, 752, 754a, 754b, 757a, 767, 821, 822a, 822b, or 824 of Title 31, or section 5 (b) of Title 50, Appendix, or any actions, regulations, rules, orders, or proclamations taken, promulgated, made, or issued pursuant to any of such sections. In any case in which a license to act with respect to any property referred to in this section is required under any of said sections, regulations, rules, orders, or proclamations, notification to the Secretary of State by the proper Government officer or agency of the issuance of an appropriate license or that appropriate licenses will be issued on application shall be a prerequisite to any action by the Secretary of State pursuant to this section, and the action of the Secretary of State shall relate only to such property as is included in such notification. Each such notification shall include the terms and conditions of such license or licenses and a description of the property to which they relate.

submitted herewith a memorandum setting forth concisely the matter of controlling decisions and other matters which I verily believe should be reconsidered.

8. There is attached in support of this motion affidavit of Mr. George F. Nolte, Assistant Vice President of the defendant, The National City Bank of New York, setting forth additional facts concerning obligations of the sovereign plaintiffs referred to in each of the two said counterclaims.

Wherefore, I verily believe that the relief requested herein should be granted.

W. Harvey Reeves.

(Sworn to January 22, 1953.)

[fol. 52] Affidavit of George F. Nolte, Read in Support of Defendant's Motion

State of New York,
County of New York, ss:

George F. Nolte, being duly sworn, says:

1. I am Assistant Vice President of The National City Bank of New York, defendant herein, and am familiar with the proceeding in this action. I have in my custody and control the bank's files relating to the account of Shanghai-Nanking Railway Administration and also the bank's files relating to the two obligations of The Republic of China, the sovereign plaintiff herein, which are mentioned and set forth respectively in the First and Second Counterclaims.

2. I have read the opinion of Mr. Justice Irving Kaufman on the motion of plaintiff to dismiss the defendant's Counterclaims and the Order and Judgment entered thereon.

3. I have examined the bank's files in my custody relating to the obligation of The Republic of China, plaintiff, particularly referred to in the First Counterclaim and I find that as to the loan in question therein referred to, the defendant, The National City Bank of New York, was one of a large number of participants in said loan

"For the purposes of this section, (1) the term "property' includes gold, silver, currency, credits, deposits, securities, choses in action, and any other form of property, the proceeds thereof, and any right, title, or interest therein; (2) the term 'foreign state' includes any foreign government or any department district, province, county, possession, or other similar governmental organization or subdivision of a foreign government, and any agency or instrumentality of any such foreign government or of any such organization or subdivision; (3) the term 'central bank' includes any foreign bank or banker authorized to perform any one or more of the functions of a central bank; (4) the term 'person' includes any individual, or any corporation, partnership, association, or other similar organization; and (5) the term 'insured bank' shall have the meaning given to it in section 264 of this title."

[fol. 32] EXHIBIT D TO AMENDED ANSWER

One of the Chinese Government 36th year (1947) Short Term Treasury Notes of the Republic of China.

(Here follows 1 Photolithograph, side folio 33)

made by J. P. Morgan & Co. to the Pacific Development Corporation. J. P. Morgan & Co. acted as agent for itself and these other participants, including the defendant. The Pacific Development Corporation delivered to J. P. Morgan & Co as collateral for and to induce the making of the said loan a bearer note made by the plaintiff [fol. 53] herein, The Republic of China, in the sum of $5,500,000 payable at the office of The Chase National Bank of the City of New York, one of the principal participants.

4. I have examined the bank's files in my custody relating to the obligations of The Republic of China which are referred to particularly in the Second Counterclaim. I find that the 36th Year Short-Term Treasury Notes were payable by their terms at the offices of the Central Bank of China and its appointed banks. The Shanghai Branch of the defendant, The National City Bank of New York, was at the time of the issuance of these Notes an appointed bank as described in the said Notes and continued to function as such until the seizure of Shanghai by the forces of the People's Government of China in May, 1949. Therefore, in my opinion The National City Bank of New York, defendant herein, was one of the places of payment of the aforesaid 36th Year Short-Term Treasury Notes. The default in the said 36th Year Short-Term Treasury Notes, including those held by the defendant, The National City Bank of New York, occurred on September 30, 1948 when interest and amortization payments due on that date were defaulted.

George F. Nolte.

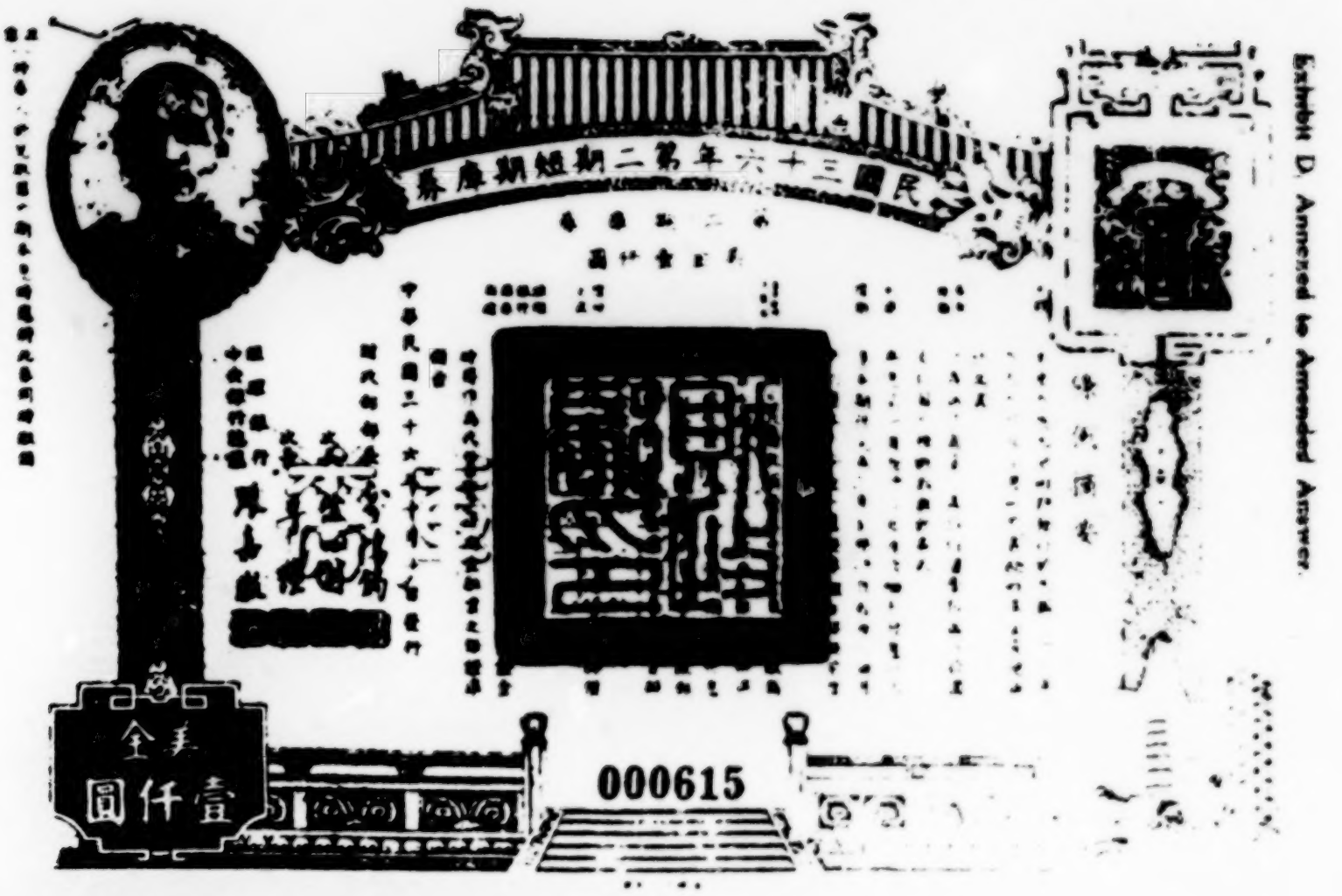
(Sworn to January 22, 1953.)

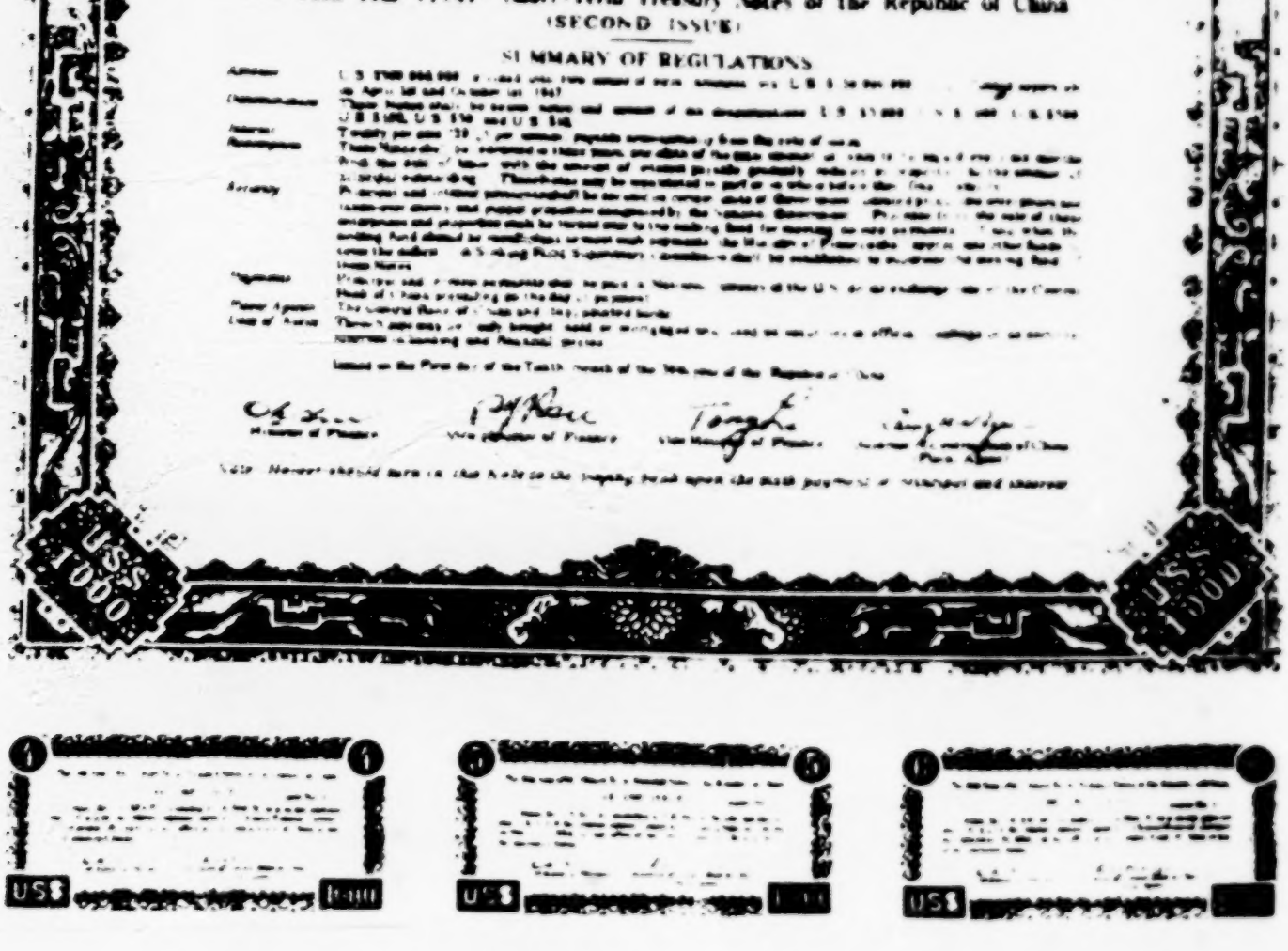
[fol. 54] AFFIDAVIT OF LOUIS J. GUSMANO, READ IN OPPOSITION TO DEFENDANT'S MOTION

STATE OF NEW YORK,
County of New York, ss:

Louis J. Gusmano, being duly sworn, deposes and says:

I am a member of the firm of Kirlin, Campbell & Keating, attorneys for the plaintiff The Republic of China in




The 36th Year (1947) Short-Term Treasury Notes of the Republic of China
(SECOND ISSUE)
SUMMARY OF REGULATIONS
US$ 1000
US$ 1000

Copy illegible.

--Cameraman's note

this matter, and I am familiar with all the pleadings and proceedings heretofore had herein.

This affidavit is submitted in opposition to defendant's motion seeking reargument of, and other relief from, the decision of Judge Irving Kaufman rendered on December 22, 1952, dismissing defendant's counterclaims upon motion made by plaintiff The Republic of China. An order and final judgment of dismissal was entered on January 9, 1953. Defendant's present application for alleged relief from said final judgment was made on January 22, 1953.

It is submitted that defendant's contentions in support of the application for reargument have been thoroughly considered by this Court upon its determination of plaintiff's motion to dismiss the counterclaims, at which time this Court determined their lack of merit.

The allegations which defendant for the first time seeks to include in the counterclaims which have been dismissed by final judgment (viz., as to the first counterclaim, that the alleged obligation is supposedly payable, not at defendant's bank in New York, but at The Chase National Bank; and as to the second counterclaim that the alleged obligations, before the seizure of Shanghai by the Communists, were supposedly payable, not at defendant's [fol. 55] bank in New York, but at its office in Shanghai) are not material inasmuch as they do not affect in the slightest this Court's determination that the counterclaims, even with the additional proposed allegations included, are not pleadable against plaintiff The Republic of China, a friendly foreign sovereign, because they are unrelated to the subject matter of plaintiff's suit.

Moreover, defendant's application made one month after the opinion of the Court was rendered and 13 days after entry of final judgment dismissing the counterclaims, must be considered untimely.

Wherefore, it is respectfully prayed that defendant's application be denied in all respects.

Louis J. Gusmano.

(Sworn to February [illegible], 1953.)

In United States District Court

Opinion, Kaufman, J., Denying Defendant's Motion for Reargument and for Leave to Amend Counterclaims, Etc.—February 19, 1953

Irving R. Kaufman, D. J.:

The motion for leave to rea-gue and for leave to amend the counterclaims and for other relief is denied. The opinion in the instant case was filed on December 22, 1952. The order of this Court dismissing the counterclaims was filed on January 9, 1953 and judgment was entered on that date. Regardless of whether Rule 9 (h) of the General [fol. 56] Rules for the Southern District of New York or Rule 59 of the Federal Rules govern the time within which this motion for reargument might be brought, it is clear that this motion is untimely. The motion for leave to amend stands in no better position than the motion for reargument for " . . . the judgment of dismissal should be reopened before an amendment to the complaint [here a counterclaim] is granted. Such relief can be sought within ten days under Federal Rules of Civil Procedure, rule 59, 28 U. S. C. A. . . ." *Markert* v. *Swift & Co.*, 173 F. 2d 517, 519 (C. A. 2, 1949). Moreover, the petitioner has filed an appeal from the judgment, so that this Court now lacks power to grant the relief sought. *Daniels* v. *Goldberg*, 8 F. R. D. 580 (S. D. N. Y. 1948) aff'd 173 F. 2d 911 (C. A. 2, 1949)

Motions denied.

Dated: New York, N. Y., February 19, 1953.

Irving R. Kaufman, U. S. D. J.

[File endorsement omitted.]

[fol. 57] In United States District Court

Order Denying Defendant's Motion for Reargument and for Leave to Amend Counterclaims, Etc.—February 27, 1953

The National City Bank of New York, the defendant herein, having moved for an order granting leave to said defendant to reargue the motion of the plaintiff for dis-

missal of the counterclaims and to vacate the order granting the said motion and judgment entered herein on January 9, 1953, or in the alternative, directing resettlement of the said order and judgment and permitting defendant to amend said counterclaims and each of them and the said defendant having at the same time and place moved for an order granting leave to the said defendant to submit within ten (10) days after the final determination thereof a further amended answer in which should be included amendments to the said counterclaims and to designate each said counterclaim also as a set-off and to include in each certain allegations as to the place and manner of payment of the obligations set forth therein, and for such other amendments as may seem pertinent; and for other and further relief; and after hearing counsel for the respective parties and on the opinion of Honorable Irving R. Kaufman dated February 19, 1953, it is

Ordered that the said motions be, and they hereby are denied.

Dated, New York, N. Y., February 27, 1953.

(Sgd.) Irving R. Kaufman, U. S. D. J.

[fol. 58] In United States District Court

[Title omitted]

Notice of Appeal—Filed March 6, 1953

Sirs:

Notice is hereby given that The National City Bank of New York, defendant herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the order dated February 27, 1953 and entered in this action on February 27, 1953 in the Office of the Clerk of this Court, by which it was ordered that the motion by the defendant, The National City Bank of New York, for an order granting leave to said defendant to reargue the motion of the plaintiff, The Republic of China, for dismissal of the counterclaims and to vacate the order granting the said motion and judgment entered herein on Janu-

ary 9, 1953, or in the alternative, directing resettlement of the said order and judgment and permitting defendant to amend said counterclaims and each of them and also by which it was ordered that the motion for an order granting leave to the said defendant to submit within ten [fol. 59] (10) days after the final determination thereof a further amended answer in which should be included amendments to the said counterclaims and to designate each said counterclaim also as a set-off and to include in each, certain allegations as to the place and manner of payment of the obligations set forth therein, and for such other amendments as may seem pertinent, and for other and further relief, be denied, and that the defendant appeals from each and every part of said order as well as from the whole thereof.

Dated, New York, N. Y., March 6, 1953.

Yours, etc., Sherman & Sterling & Wright. By: (Sgd.) Walter K. Earle, A Member of the Firm, Attorneys for Defendant, The National City Bank of New York, 20 Exchange Place, New York 5, N. Y.

To: Messrs. Kirlin Campbell & Keating, Attorneys for Plaintiff, The Republic of China, 120 Broadway, New York 5, New York.

[fols. 60-61] Designation as to Contents of Record—Filed March 11, 1953

(Omitted in printing)

[fol. 62] Stipulation of Attorneys Approving Record

(Omitted in printing)

[fol. 63] Clerk's Certificate to foregoing transcript omitted in printing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 44—October Term, 1953.

Argued November 10, 1953

Docket No. 22773

THE REPUBLIC OF CHINA,
Plaintiff-Appellee,

and

SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,
Plaintiffs,

—v.—

THE NATIONAL CITY BANK OF NEW YORK,
Defendant-Appellant.

Before:

SWAN, FRANK and MEDINA, *Circuit Judges.*

KIRLIN CAMPBELL & KEATING (Cletus Keating, Robert E. Kline, Jr., and Louis J. Gusmano, of counsel) *for the Republic of China.*

SHEARMAN & STERLING & WRIGHT (Chauncey B. Garver and W. Harvey Reeves, of counsel) *for The National City Bank of New York.*

Appeal from orders of the United States District Court for the Southern District of New York, Judge Irving R. Kaufman, presiding. Affirmed.

OPINION—December 8th, 1953

FRANK, *Circuit Judge:*

The plaintiffs, the Republic of China (with its National Government now located in Formosa) and others, brought this suit under section 25(b) of the Federal Reserve Act, 12 U. S. C. A. sec. 632, to recover $200,000 which, according to the complaint, was deposited with the defendant bank and which defendant refuses to pay. The complaint alleges that the deposit was made by plaintiff, the Shanghai-Nanking Railway Administration, an agency of The Republic of China, and that the Secretary of State of the United States, pursuant to section 25(b) has certified to defendant that the deposit belongs to the Republic of China. Defendant's amended answer includes not only denials and affirmative defenses but also two counterclaims which Judge Kaufman in his opinion—108 F. Supp. 766—summarized as follows: "The first counterclaim alleges that on or about August 9, 1920, defendant participated in a loan made by J. P. Morgan & Co. to the Pacific Development Co. in the face amount of $5,000,000, said loan being secured by a $5,500,000 Chinese Government Treasury Note, being the Note of the plaintiff herein, The Republic of China. Said loan was not paid on its maturity date by Pacific Development Company and subsequently Pacific Development Company was liquidated. In the course of said liquidation, J. P. Morgan & Co. offered the collateral for sale at public auction and purchased the collateral on behalf of the participants in the loan to the Pacific Development Company. The Chinese Government Treasury Note is still held by J. P. Morgan & Co. and is now past due, and by virtue thereof there is said to be owing to the defendant the sum of $317,720.93 plus

interest of $590,386.53. For a second counterclaim against plaintiff, The Republic of China, the defendant alleges that between April and August 1947 defendant began the purchase of Chinese Government 36th Year Short Term Treasury Notes of The Republic of China. On these notes, the plaintiff, The Republic of China, is said to be indebted to the defendant in the sum of $391,033.60 principal together with interest thereon in the sum of $335,290.94. Defendant demands judgment against the plaintiffs dismissing the complaint with costs, and against the plaintiff, The Republic of China, for the sum of $1,634,432."

Each counterclaim contained this allegation: "The plaintiff, The Republic of China, is, and at all times hereinafter mentioned was, a sovereign government recognized as such by the duly appointed Executive Department of the United States."

The defendant's amended answer also shows the following: Regulations issued by the Republic of China in connection with the 36th Year Short-Term Treasury Notes provided that the "Fiscal Agents" for the payment of those Notes were the Central Bank of China and its "appointed banks"; a branch of defendant in Shanghai, China, was one of these "appoiated banks"; it continued to be such when in 1948, because of a default, the principal of those Notes became payable, and thereafter until the seizure of Shanghai by the People's Government of China in May, 1949.

On the motion of plaintiff, the Republic of China, these counterclaims were dismissed by an order entered January 8, 1953. Some thirteen days later, defendant moved for leave to submit a further amendment of its answer to include amendments of the counterclaims designating each as a "set off" and specifically alleging that defendant's Shanghai branch was one of the banks at which the 36th Year Short-Term Notes were payable. An affidavit accompanying this motion stated that the Treasury Note described in the first

counterclaim was payable at the Chase National Bank, New York. This motion was denied by an order entered February 27, 1953. This appeal is from the orders of January 8 and February 27, 1953. For the purposes of this appeal, we shall consider the counterclaims as if they had been further amended in the manner thus proposed by defendant.

1. As the defendant in each of its counterclaims, specifically alleged that the Republic of China is and was a sovereign government recognized as such by our government, there was no need, in passing on the motion to dismiss, to have a trial to determine that fact.[1] We recently stated, in *Republic of China* v. *American Express Company*, 195 F. (2d) 230 (C. A. 2), that a "friendly, foreign sovereign, recognized by the United States, cannot be sued in the courts of this country without its consent." We went on to say, however, that, when a sovereign sues in our courts to enforce a claim, "it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. * * * Accordingly, we have held that a sovereign who sues in our courts so submits itself to the jurisdiction it has invoked that defenses by way of set-off and of counterclaim are available against it. * * * But the waiver of immunity [2] does not extend beyond, at most, counterclaims which are based upon the subject matter of the suit." We think the trial judge correctly held that the counterclaims here were not based on the subject matter of the suit. We reach the same result

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[1] As Judge Kaufman said: "While this point might be well taken if it were directed to a motion to strike the affirmative defenses, it is wholly inappropriate here for the simple reason that the counterclaims in question are pleaded, not against the Shanghai-Nanking Railway Administration but against The Republic of China itself."

[2] We agree with Judge Kaufman that the "agreement" by "implication" and the "waiver" are fictions used in the interest of achieving justice.

if we regard the counterclaims as but set-offs.[3] For the assertion against a sovereign government of a counterclaim or set-off, unrelated to the claim asserted by the sovereign in its suit, is the equivalent of an independent suit against that sovereign brought without its consent.[4] Wherefore we think the district court's orders were correct.

Defendant has referred us to a letter dated May 19, 1952, from Mr. Tate, Acting Legal Adviser to the State Department, to the Attorney General,[5] calling attention to a so-called "trend" or "shift of policy" on the part of our State Department tending to restrict the sovereign immunity of foreign governments to "governmental" or "public" acts and to exclude "private acts" or "commercial activities." Defendant, as we understand it, does not argue that this new trend, if adopted by our courts, would here serve to deprive plaintiff of its sovereign immunity. Defendant's position seems to be that the alleged new trend indicated in this letter should be further extended judicially so as to validate the counterclaims in the instant case. Assuming, *arguendo*, that this letter could and should affect judicial decisions, we see nothing in it to justify the suggested extension. We have no high regard for the idea that, without its consent, a government may not be sued for acts which, if done by a private person, would be actionable wrongs.[6] But we feel that we must leave to Congress or the

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[3] See *United States* v. *Shaw*, 309 U. S. 495, 503-504, quoting with approval from *Nassau Smelting Works* v. *United States*, 266 U. S. 101, 106, in discussing *The Thekla*, 266 U. S. 328, decided the same day as the *Smelting Works* case.

[4] See *In re Monongahela Rye Liquors*, 141 F. (2d) 864, 869 (C. A. 3). Our disagreement with that decision in *United States* v. *Roth*, 164 F. (2d) 575 (C. A. 2), turned entirely on the recent statutory amendments to the Bankruptcy Act which apparently had not been considered by the Third Circuit.

[5] See 26 Department of State Bulletin (June 23, 1952) 984-985.

[6] Cf. *Wallace* v. *United States*, 142 F. (2d) 240, 243 (C. A. 2).

Supreme Court any marked diminution of that hoary doctrine (although, in the belief of many persons, it is basically immoral).

2. Defendant also relies on Section 147 of the New York Negotiable Instrument Law which provides: "Where the instrument is made payable at a bank it is equivalent to an order of the bank to pay the same for the account of the principal debtor thereon." We think it plain that this provision of the New York statute has no application to the 36th Year Short-Term Treasury Notes, covered by the second counterclaim, since they are payable in China.

The Note referred to in the first counterclaim is not payable at the defendant bank but at another New York bank. We think that fact prevents Section 147 from operating to give rise to a waiver by The Republic of China of its immunity with respect to the first counterclaim. See *United States* v. *New York Trust Co.*, 75 F. Supp. 583, 587; *United States* v. *National City Bank of New York*, 90 F. Supp. 448, 454. We think it irrelevant for this purpose that the defendant has a part interest in any proceeds of the Note.

3. Defendant also contends that it had a so-called "bankers' lien," or right of set-off, based on the Treasury Notes named in the second counterclaim. We think this contention untenable. For the deposit, the subject of this suit, was made with defendant in New York, and continued thereafter to be owing by it in New York, whereas those Treasury Notes, purchased by defendant's Shanghai branch, were there payable. The creation of such a branch bank finds its authorization in Section 25 of the Federal Reserve Act, 12 U. S. C. Sections 601-604, which provides: "Every national banking association operating foreign branches *shall conduct the accounts of each foreign branch independently of the accounts* of other foreign branches estab-

lished by it and *of its home office*,[7] and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item." This provision has been interpreted to mean that a national bank and each of its foreign branches are separate entities, to be treated as if they were unrelated banks with respect to business done between them, and for many other purposes.[8] In *Pan-American Bank & Trust Co.* v. *National City Bank*, 6 F. (2d) 762, 767 (C. A. 2), this court, after quoting Section 25, said: "That is, the branch is not a mere 'teller's window'; it is a separate business entity. * * * But the Rio branch, in so becoming a holder of the drafts, and then sending them to New York for collection, assumed the same relation to its home office that any other bank or person that had similarly negotiated the paper would have assumed. In fact, as the evidence shows, the drafts and accompanying documents went from the Rio branch to the New York home office with a demand for credit; *i.e.*, a demand for payment, and payment by the demanded credit was given the branch. This was just what the cited act of Congress in effect requires, and illustrates the rulings that, in respect of the collection of forwarded paper, branches and a parent bank are to be considered as separate entities. * * * The case presents a legal problem identical with the common one resulting from discount by any indifferent dealer in commercial paper of such a draft as Barcellos', and presentation by such dealer of the draft to the drawee for payment." See also *In re Harris*, 27 F. Supp. 480 (S. D. N. Y.); *Bluebird Undergarment Corporation* v. *Gomez*, 139 Misc. 742, 249 N. Y. S. 319; cf. *Marlborough*

[7] Emphasis added.

[8] See *McGrath* v. *Agency of Chartered Bank of India*, 104 F. Supp. 964, 967-968.

Trust Company v. *Elliot*, 86 F. (2d) 315, 316-317.[9] We think this reasoning leads to the conclusion that defendant had no set-off.

Affirmed.

[9] Cases as to branch banks not governed by a statute like Section 25 are not pertinent. Such cases are *Garnett* v. *M'Kewan*, 8 L. R. Exchequer 10; *Prince* v. *Oriental Bank Corporation*, 3 A. C. 325, cf. *Rex* v. *Lovitt* [1912] A. C. 212.

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE REPUBLIC OF CHINA, Plaintiff-Appellee,

and

SHANGHAI NANKING RAILWAY ADMINISTRATION, MOH HAN, etc., et al., Plaintiffs,

v.

THE NATIONAL CITY BANK OF NEW YORK, Defendant-Appellant

JUDGMENT—December 8th, 1953

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and they hereby are affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance wtih this decree.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

(3607)

[fol. 74] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 612

THE NATIONAL CITY BANK OF NEW YORK, Petitioner,

vs.

THE REPUBLIC OF CHINA, et al.

ORDER ALLOWING CERTIORARI—Filed April 26, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.